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Muhd Haslam bin Abdullah v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-411–09 OF 2017
KAMARDIN HASHIM, MOHAMAD ZABIDIN AND LEE SWEE SENG JJCA
1 NOVEMBER 2019

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Criminal Procedure — Accused — Accused suffered from mental disability — Protocols trial court should observe to accord such accused persons a fair trial — Whether trial court had to be continually vigilant throughout trial to ensure accused was able to follow court's procedures and unfolding of evidence and was able

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to put forth his defence effectively even though mentally disabled accused was medically certified fit to stand trial — Whether in keeping with ss 342 and 343 of the Criminal Procedure Code medical report or certificate on mentally disabled accused should be marked as exhibit and made part of record of evidence so that appellate courts could assess nature, extent and degree of mental disability vis a vis

E

the crime committed in order to determine culpability

The appellant, who was mentally handicapped and was registered as a 'Person With Disability' under s 25 of the Persons With Disabilities Act 2008 and in possession of a 'Kad OKU', was convicted and sentenced to death by the High

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Court for trafficking in 242g of cannabis contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. The High Court had proceeded with the trial against the appellant after a government mental hospital had certified him fit to stand trial for the offence. In convicting the appellant, the trial judge chose to believe the prosecution's version of events rather than the appellant's. The

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prosecution's evidence was that a police surveillance team led by PW3 had, acting on information received, found the appellant sitting alone in the driver's seat of a car in the car park of an apartment block ('the place of incident') with a newspaper-wrapped package containing the cannabis between his thighs. This led the trial judge to find that the appellant had mens rea possession and

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knowledge of the drugs since he had physical possession of the package and was alone in the car at the time. In making his defence vide a statement from the dock, the appellant disagreed with the prosecution's version and said the police party recovered the package from beneath the driver's seat of the car after they had searched the vehicle and that the package was never found on his person.

I

The appellant said that the car belonged to his girlfriend ('PW4') who had earlier taken him to hospital for an appointment with his psychiatrist. After the hospital visit, the appellant had borrowed the car to meet his friend named 'Dharan' who stayed at an apartment near the place of the incident. The appellant said that after he met Dharan, the latter had borrowed the car to go

somewhere for about half an hour and after he returned and left the car with the engine running and while the appellant was sitting alone in the front passenger seat, the police ambushed the car. The appellant denied any knowledge about the package or the drugs and told police where Dharan was staying but they were not interested in investigating Dharan's whereabouts. In her testimony, PW4 confirmed that the appellant had spoken about Dharan several times even before the incident. The investigating officer of the case, PW5, testified that although the name 'Dharan' came up during his investigations he did not probe the matter further.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The fact that there was a person named 'Dharan', whom the appellant had wanted to visit by borrowing PW4's car, was confirmed by PW4 in her testimony. She had heard the appellant talking about 'Dharan' on a few occasions even before the date of the incident. PW4 was the prosecution's witness and her evidence was part of the prosecution's case. The prosecution could not therefore pick and choose to use only that part of PW4's evidence which was favourable to them and discard or downplay other material evidence that was capable of raising a reasonable doubt in the prosecution's case (see paras 80 & 83).

(2) The police's investigation into the case was not thorough. PW5 admitted in evidence that he never investigated Dharan's existence. Dharan was certainly not an afterthought and the police should have investigated his identity and whereabouts instead of ignoring the appellant's explanation altogether. No fingerprint tests were done on the package, the ignition key, steering wheel or door handle of the car to ascertain if there could have been a third person involved who might have been Dharan. In his police report lodged soon after the appellant's arrest, PW3 had stated that a male Indian was driving the car although he had known by then that the appellant was an Indian Muslim. In his judgment, the trial judge stated that even if Dharan existed, the appellant had deliberately shut his eyes to the contents of the newspaper-wrapped package. But that was not a reasonable conclusion to make given that the appellant was mentally disabled with a below-average IQ score (see paras 94–100).

(3) In his police report, PW3 said that he had searched the car and following the search found the newspaper-wrapped package between the appellant's thighs. The police report was made contemporaneously after the appellant's arrest and it would be more reliable than PW3's subsequent version in court that when he arrested the appellant by placing his hand on the appellant's chest, he saw the package between the appellant's thighs. This material discrepancy raised a reasonable doubt on the prosecution's case as to where the cannabis was found. It was more

likely found beneath the driver's seat after a search was done on the car as stated by the appellant in his unsworn statement. PW3 with the rank of ASP and with 30 years of experience in the police force could not have made a mistake on the sequence of events with respect to a search being made on the car and the discovery of the package (see paras 77–79).

(4) Overall, the trial judge had not addressed his mind to the appellant's defence as best he could within a criminal justice system that the appellant was ill-equipped to cope with. There was a serious doubt whether the conviction was safe and that the prosecution had proved the charge against the appellant beyond reasonable doubt (see paras 116–117).

(5) The medical report on the appellant stating that the appellant was of sound mind and fit to stand trial was not marked as an exhibit and was not in the appeal record. A copy of the medical report was apparently not even given to the appellant. Section 342(2) read with s 343(1) and (3) of the Criminal Procedure Code required such a medical report or certificate signed by the medical officer to be part of the evidence before the court if accepted by it. Unfortunately, such an important piece of evidence was not marked as an exhibit and this court did not know its contents or the reasons for the medical officer's conclusions nor the nature, extent and degree of the appellant's mental disability (see paras 8–9).

(6) If the trial judge had set out clearly what was said by the government psychiatrist with respect to the appellant's mental disability, this court would have been in a better position to agree with the trial judge that given the degree of mental disability, the appellant's version of events, and the presumption that he had knowledge about the drugs, had not been rebutted on balance of probabilities. Without knowing the degree of the appellant's mental disability, this court was left in serious doubt as to whether the trial judge had properly directed himself in holding that the appellant had not rebutted the presumption of knowledge about the drugs. The appellant's version of what had happened on the day of the incident was neither fanciful nor far-fetched to be dismissed as a figment of his deranged imagination (see paras 62–64).

(7) In his judgment, the trial judge gave scant treatment to the medical report on the appellant and appeared to have taken a simplistic approach in that since the appellant was medically certified fit to stand trial and was not insane, he should be treated like any ordinary accused person. This was a non-direction amounting to a misdirection by the trial judge. Despite the certification of fitness to stand trial, the trial judge still had to continually assess and address throughout the trial whether the appellant was able to follow the court's procedure and the unfolding of the evidence and whether he was able to put forth his defence effectively. It was

incumbent upon the trial court to ensure that a mentally disabled person like the appellant was not disadvantaged in any way but was given a fair trial by a criminal justice system that was designed to primarily try 'normal persons' (see paras 17–22, 31, 35, 55 & 115).

(8) The trial judge had relied on cases of 'normal' accused persons who did not suffer from any mental disabilities in applying the proposition that an unsworn statement from the dock carried less weight compared to evidence given under oath. When dealing with 'vulnerable' persons like the OKU appellant, the court had to take judicial notice of his mental disability. The fact that such a person chose to give evidence by way of an unsworn statement from the dock should not be given less weight for that might be the only way he was competent and confident in giving evidence. With respect to persons like the appellant, the criminal procedure had to be adapted in such a way as to facilitate the accused's evidence-giving in a meaningful and effective way instead of frustrating it or giving it featherweight, appreciating that an accused who was mentally disabled was disadvantaged by a system that worked well only with 'normal' accused persons (see paras 38 & 107–109).

[Bahasa Malaysia summary

Perayu, seorang kurang upaya secara mental dan didaftarkan sebagai 'Orang Kurang Upaya' di bawah s 25 Akta Orang Kurang Upaya 2008 dan memiliki 'Kad OKU', disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedarkan ganja seberat 242g kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Mahkamah Tinggi telah meneruskan perbicaraan terhadap perayu setelah sebuah hospital mental kerajaan mengesahkan beliau layak untuk dibicarakan atas kesalahan tersebut. Dalam menjatuhkan hukuman kepada perayu, hakim perbicaraan memilih untuk mempercayai versi peristiwa pendakwaan berbanding perayu. keterangan pendakwaan adalah bahawa pasukan polis pengawasan yang diketuai oleh PW3, berdasarkan maklumat yang diterima, mendapati perayu duduk bersendirian di tempat duduk pemandu di tempat letak kereta blok pangsapuri ('tempat kejadian') bersama bungkusan surat khabar berisi ganja di antara peha beliau. Ini menyebabkan hakim perbicaraan mendapati bahawa perayu mempunyai mens rea dan pengetahuan mengenai dadah tersebut kerana beliau memiliki bungkusan tersebut secara fizikal dan beliau sendirian di dalam kereta pada masa tersebut. Ketika mengemukakan pembelaannya dari kandang, perayu tidak bersetuju dengan versi pendakwaan dan mengatakan bahawa pihak polis mendapatkan bungkusan tersebut dari bawah tempat duduk pemandu setelah mereka menggeledah kenderaan dan bungkusan tersebut tidak dijumpai bersama-sama beliau. Perayu mengatakan bahawa kereta tersebut adalah milik teman wanitanya ('PW4') yang sebelumnya membawa beliau ke hospital untuk temu janji dengan psikiatriknya. Selepas ke hospital, perayu telah meminjam kereta untuk menemui rakannya yang bernama 'Dharan' yang

tinggal di sebuah apartmen berhampiran tempat kejadian. Perayu mengatakan bahawa setelah beliau bertemu Dharan, beliau telah meminjam kereta tersebut untuk pergi ke suatu tempat selama kira-kira setengah jam dan setelah beliau kembali dengan meninggalkan kereta dengan enjin berjalan dan ketika perayu duduk sendirian di tempat duduk penumpang depan, polis menyerbu kereta tersebut. Perayu menafikan sebarang pengetahuan mengenai bungkusan atau dadah tersebut dan memberitahu polis di mana Dharan tinggal tetapi mereka tidak berminat untuk menyiasat keberadaan Dharan. Dalam keterangannya, PW4 mengesahkan bahawa perayu telah bercakap tentang Dharan beberapa kali sebelum kejadian. Pegawai penyiasat kes tersebut, PW5, memberi keterangan bahawa walaupun nama 'Dharan' disebut semasa siasatannya, beliau tidak menyiasat perkara tersebut lebih mendalam.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman serta membebaskan dan melepaskan perayu:

(1) Fakta bahawa terdapat seorang bernama 'Dharan', yang ingin dilawat oleh perayu dengan meminjam kereta PW4, telah disahkan oleh PW4 dalam keterangan beliau. Beliau pernah mendengar perayu bercakap tentang 'Dharan' beberapa kali sebelum tarikh kejadian. PW4 adalah saksi pendakwaan dan keterangannya adalah sebahagian daripada kes pendakwaan. Oleh itu, pihak pendakwaan tidak boleh mengambil dan memilih untuk menggunakan hanya sebahagian daripada keterangan PW4 yang berpihak kepada mereka dan membuang atau menyorok keterangan material lain yang dapat menimbulkan keraguan yang munasabah dalam kes pendakwaan (lihat perenggan 80 & 83).

(2) Siasatan pihak polis terhadap kes tersebut tidak menyeluruh. PW5 mengakui dalam keterangannya bahawa beliau tidak pernah menyiasat keberadaan Dharan. Dharan tentunya bukan pemikiran semula dan polis seharusnya menyiasat identiti dan keberadaannya, sebaliknya telah mengabaikan penjelasan perayu sama sekali. Tidak ada ujian cap jari yang dilakukan pada bungkusan, kunci kereta, roda stereng atau pemegang pintu kereta untuk memastikan sekiranya terdapat pihak ketiga yang terlibat yang mungkin merupakan Dharan. Dalam laporan polis yang dibuat setelah penangkapan perayu, PW3 telah menyatakan bahawa seorang lelaki India memandu kereta itu walaupun beliau telah mengetahui bahawa perayu itu adalah seorang India Muslim. Dalam penghakimannya, hakim perbicaraan menyatakan bahawa walaupun Dharan wujud, perayu telah dengan sengaja mengabaikan kandungan bungkusan surat khabar tersebut. Namun ianya bukanlah kesimpulan yang wajar untuk dibuat memandangkan perayu seorang kecacatan mental dengan skor IQ di bawah purata (lihat perenggan 94–100).

(3) Dalam laporan polisnya, PW3 mengatakan bahwa beliau telah menggeledah kereta tersebut dan melalui pencarian tersebut telah

menemukan bungkusan surat khabar di antara peha perayu. Laporan polis dibuat secara serentak setelah penangkapan perayu dan ianya lebih dipercayai berbanding versi PW3 di mahkamah bahawa ketika beliau menangkap perayu dengan meletakkan tangannya di dada perayu, beliau melihat bungkusan di antara paha perayu. Perbezaan yang material ini telah menimbulkan keraguan yang munasabah terhadap kes pendakwaan mengenai di mana ganja tersebut dijumpai. Berkemungkinan besar ianya dijumpai di bawah tempat duduk pemandu setelah penggeledahan dibuat di dalam kereta seperti yang dinyatakan oleh perayu keterangan tidak bersumpah beliau. PW3 dengan pangkat ASP dan berpengalaman selama 30 tahun dalam pasukan polis tidak seharusnya melakukan kesilapan pada rentetan peristiwa berkenaan dengan pencarian yang dilakukan di dalam kereta dan penemuan bungkusan tersebut (lihat perenggan 77–79).

(4) Secara keseluruhan, hakim perbicaraan tidak memberikan perhatian sepenuhnya kepada pembelaan perayu dengan sebaik mungkin dalam sistem perundangan jenayah yang mana tidak mampu diatasi oleh perayu. Terdapat keraguan serius sama ada sabitan tersebut sah dan bahawa pihak pendakwaan telah membuktikan tuduhan terhadap perayu di luar keraguan yang munasabah (lihat perenggan 116–117).

(5) Laporan perubatan perayu yang menyatakan bahawa perayu adalah waras dan layak untuk diadili tidak ditanda sebagai ekshibit dan tidak terkandung dalam rekod rayuan. Salinan laporan perubatan juga tidak diserahkan kepada perayu. Seksyen 342(2) yang dibaca bersama dengan s 343(1) dan (3) Kanun Tatacara Jenayah memperuntukkan laporan perubatan atau sijil perakuan yang ditandatangani oleh pegawai perubatan untuk menjadi sebahagian dari keterangan di mahkamah sekiranya diterimapakai. Malangnya, bukti penting seperti itu tidak ditandakan sebagai ekshibit dan mahkamah ini tidak mengetahui kandungannya atau alasan terhadap kesimpulan oleh pegawai perubatan atau sifat, kadar dan tahap kecacatan mental perayu (lihat perenggan 8–9).

(6) Sekiranya hakim perbicaraan telah memutuskan dengan jelas apa yang dikemukakan oleh psikiatrik kerajaan berkenaan dengan kecacatan mental perayu, mahkamah ini akan berada dalam posisi yang lebih baik untuk bersetuju dengan hakim perbicaraan berkenaan dengan tahap kecacatan mental, versi peristiwa perayu, dan anggapan bahawa beliau mempunyai pengetahuan tentang dadah tersebut, tidak disangkal oleh imbangan kebarangkalian. Tanpa mengetahui tahap kecacatan mental perayu, mahkamah ini dibiarkan dengan keraguan yang mantap sama ada hakim perbicaraan telah menetapkan diri beliau dalam memutuskan bahawa perayu tidak menyanggal anggapan pengetahuan mengenai dadah tersebut. Versi perayu dari apa yang telah terjadi pada hari kejadian

tidak direka-reka atau tidak masuk akal untuk ditolak sebagai gambaran khayalannya yang terganggu (lihat perenggan 62–64).

(7) Dalam penghakimannya, hakim perbicaraan memberikan sedikit rujukan terhadap laporan perubatan kepada perayu dan telah mengambil pendekatan remeh apabila perayu telah disahkan suaimanfaat untuk diadili dan waras, beliau harus diperlakukan seperti mana-mana tertuduh yang lain. Ini bukanlah pendekatan yang salah arah oleh hakim perbicaraan. Walaupun telah diperakui suaimanfaat untuk diadili, hakim perbicaraan masih harus secara terus menerus menilai dan mennyatakan sepanjang perbicaraan sama ada perayu dapat mengikuti prosedur pengadilan dan mengemukakan pembuktian dan sama ada beliau dapat mengemukakan pembelaannya dengan berkesan. Ianya adalah tanggungjawab mahkamah perbicaraan untuk memastikan bahawa orang kecacatan mental seperti perayu tidak diambil mudah dengan apa cara sekalipun tetapi diberikan perbicaraan yang adil oleh sistem perundangan jenayah yang direka untuk mengadili 'orang normal' (lihat perenggan 17–22, 31, 35, 55 & 115).

(8) Hakim perbicaraan telah bergantung kepada kes-kes tertuduh 'normal' yang tidak mengalami kecacatan mental dalam mengguna pakai anggapan bahawa kenyataan tidak bersumpah dari kandang lebih ringan jika dibandingkan dengan keterangan yang diberikan secara bersumpah. Ketika mengadili orang-orang yang 'terdedah' seperti perayu OKU, mahkamah harus mengambil perhatian kehakiman terhadap mentalnya. Fakta bahawa orang seperti itu memilih untuk memberikan keterangan secara tidak bersumpah dari kandang tidak seharusnya diambil ringan kerana ianya mungkin satu-satunya cara beliau lebih cekap dan yakin dalam memberikan keterangan. Berkenaan dengan orang-orang seperti perayu, prosedur jenayah harus disesuaikan sedemikian rupa untuk mempermudah pengemukaan keterangan oleh tertuduh dengan cara yang bermakna dan berkesan, bukannya memberikan kesusahan atau kepayahan, menghargai seorang tertuduh yang cacat mental amat merugikan oleh sistem yang berfungsi dengan baik hanya dengan orang tertuduh 'normal' (lihat perenggan 38 & 107–109).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Azahan bin Mohd Aminallah v PP [2005] 5 MLJ 334, CA (folld)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Hamzah bin Osman v PP [2017] 5 MLJ 16, FC (refd)
Mohammad Reza Lajevardi Taghi v PP [2015] 5 MLJ 116, CA (refd)
PP v Tan Chee Kern & Anor [2001] MLJU 557; [2002] 1 CLJ 210, HC (refd)
PP v Misbah bin Saat [1997] 3 MLJ 495, HC (refd)

Rex v Dashwood [1943] KB 1 (refd)
Siew Yoke Keong v PP [2013] 4 CLJ 149, FC (refd)
Wong Ban Chong v PP [2015] 3 MLJ 849, CA (refd)

Legislation referred to

Criminal Law (Mentally Impaired Accused) Act 1996 [AUS] ss 8, 9, Part 3
Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 [UK]
Criminal Procedure (Mentally Impaired Persons) Act 2003 [NZ] ss 4, 8A
Criminal Procedure Code ss 258, 342(1), (2), (3), 343, 343(1), (3)
Dangerous Drugs Act 1952 ss 2, 12(2), 39A(2), 39B(1)(a), (2)
Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 [NZ] s 7
Persons With Disabilities Act 2008 ss 2, 25(2)

Appeal from: Criminal Trial No 45A-1–01 of 2015 (High Court)

K Viknesvaran (Viknes Ratna & Co) for the appellant.
Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The appellant was charged for trafficking in 242g of dangerous drugs ie cannabis on 11 March 2014 at around 2.45pm at the parking place in front of Block Delima, Taman Tun Teja, Rawang, in the district of Gombak, in the State of Selangor, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the DDA.

[2] At the end of the trial the learned trial judge found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant and sentenced him to the mandatory death penalty under s 39B(2) of the DDA. The appellant appealed to this court against conviction and sentence.

[3] Two things must be mentioned at the outset of this appeal against the conviction and death sentence passed on the appellant.

[4] During case management on 16 April 2015 it was obvious to all parties that the appellant is not an ordinary normal person but that he has a disability of the intellect or mind and so the court sent him for observation at a government mental hospital to ascertain if he was fit to stand trial for the offence. This was in the exercise of the court's powers under s 342(1) and (3) Criminal Procedure Code ('the CPC').

A PROTOCOL TO FOLLOW WITH RESPECT TO A MENTALLY DISABLED PERSON BEING CAPABLE OF MAKING HIS DEFENCE

[5] The procedure taken by the learned trial judge is part and parcel of the process of ensuring a fair trial to an accused, especially in the case of a mentally disabled accused. The principle that no man can be tried for a crime unless he is in a mental condition to defend himself is derived from the early English case of *Rex v Dashwood* [1943] KB 1.

[6] Section 342(1) of the CPC provides:

> Where a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently incapable of making his defence, he shall in the first instance investigate the fact of such unsoundness.

[7] The trial court is dutybound to ensure that a person standing trial is fit to do so. The procedure and the rationale for it had been commented on in the case of *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 where it was observed as follows at pp 502–503:

> The court's attention as to the mental condition of the accused for purposes of determining whether he is fit to stand trial may be drawn by the accused himself, the prosecutor or the medical officer. In *R v Dashwood*, above, it was said at p 4:
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> > It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as, for instance, the medical officer of the prison where the defendant has been confined.
>
> Similarly in *R v Beynon* [1957] 2 All ER 513 at p 515, it was pointed out:
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> > ... if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that the issue is tried, even though no application is made by the prosecution or by the defence.
>
> It should perhaps also be pointed out that there is another provision under the CPC to enable the public prosecutor, even before the trial, to send an accused person whom he suspects to be of unsound mind to a mental hospital for observation: s 342(5).

[8] The medical report dated 12 May 2015 came back from the Hospital Bahagia Ulu Kinta confirming that the appellant was of sound mind and was conscious of the consequences of his actions at the time of the incident. According to the learned trial judge the medical report further stated that the appellant was mentally stable and fit to stand trial and able to defend himself even though he holds an OKU ('Orang Kurang Upaya' or 'A Person with

Disability') card marked as exh D30. This OKU card issued on 7 August 2012 was introduced during the cross-examination of PW4, the girlfriend of the appellant.

[9] The medical report was not marked as an exhibit and not in the appeal record. According to learned counsel for the appellant on appeal, the appellant was not given a copy of the medical report. Section 342(2) read with s 343(1) and (3) of the CPC require such a medical report or certificate signed by the medical officer to be part of the evidence before the court if so accepted by the court but unfortunately such an important piece of evidence was not marked as an exhibit and we do not know its contents or the reasons for the medical officer to arrive at his conclusion nor the nature, extent and degree of the appellant's mental disability. Section 342(2) of the CPC reads as follows:

> (2) At the investigation it shall not be necessary for the accused person to be present and the Judge or Magistrate may *receive as evidence a certificate in writing signed by a Medical Officer* to the effect that the accused person is in his opinion of unsound mind or is a proper person to be detained for observation in a psychiatric hospital, or the Judge or Magistrate may, *if he sees fit take oral evidence from a Medical Officer on the state of mind of the accused person*. (Emphasis added.)

[10] Section 343 of the CPC reads as follows:

> 343 Certificate of Medical Director
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> (1) If the Medical Director shall certify that the accused person is of *sound mind and capable of making his defence* the Judge or Magistrate shall proceed with the trial.
>
> (2) If the Medical Director shall certify that that person is of unsound mind and incapable of making his defence the Court shall, if satisfied of the fact, find accordingly, and thereupon the trial shall be postponed.
>
> (3) The *certificate* of the Medical Director shall be *receivable as evidence* under this section. (Emphasis added.)

[11] The Federal Court in *Hamzah bin Osman v Public Prosecutor* [2017] 5 MLJ 16 at pp 21–22 had held that the failure to have the medical certificate tendered in court and marked as evidence is fatal and not curable as follows:

> [8] *It must be emphasised, that ss 342 and 343 of the CPC is concerned with the mental state of mind of the appellant at the time of the plea. These aforesaid sections afford protection to an accused who is suspected of being of unsound mind and would be incapable of understanding the nature of the charges against him and the meaning and import of evidence adduced against him. The 'raison d'etre' of these sections is that the mental state of the accused renders him in capable of making his defence thereby reducing his presence at the proceedings to a nullity. These sections do not apply to a situation where the accused is going to rely on a plea of insanity as a defence at the time of the commission of the offence.* In our instant case a plea of insanity was never raised by the appellant. To encapsulate, we are dealing with the concept of fitness to plead, or fitness to stand trial, fitness to be tried and fitness to make defence which is the phraseology in

ss 342 and/or 343 of the CPC, but which terms are used interchangeably (see *Kesavarajah v The Queen* (1994) 181 CLR 230 at p 232, NB p 234).

[9] On the evidence, it is clear the High Court, after having investigated the fact of unsoundness of the appellant, exercised its powers under 342(3) and remanded the appellant for observation at Hospital Bahagia Tanjong Rambutan. We note from the notes that no certificate of the Medical Director was forthcoming nor was the same produced and or tendered in court. Apart for an oral assertion by the respondent which tantamounted to a statement from the BAR table at the highest, there was clearly non-compliance with s 324(1) of the CPC. In our view, the soundness or otherwise of the appellant to plead remained unresolved as the basis for the finding must be the certificate to state whether the appellant was fit to stand trial, although the Medical Director needed not be present in court to tender the same his certificate would be admissible. Since there was non-compliance of s 343(1) of the CPC after a reference was made by the High Court under s 342(1) of the CPC, in our view proceeding with the trial as was done in this case by the High Court rendered the trial a nullity.

[10] The Court of Appeal in its grounds of judgment dealt with the issue at paras 27–29 of their grounds appearing at pp 30, 34 and 40 of the same. The essence of the approach of the Court of Appeal was as the trial had proceeded in earnest, the issue of fitness to plead had been overtaken by circumstances and at any rate no prejudice had befallen the appellant. This was echoed by the respondents in their submissions before this court. We would hold that the statutory injunctions in s 342(1) and 343 of the CPC are sacrosanct to the fundamental right of the appellant in our Criminal Justice System to avail himself of the right to ensure that he is in law fit to plead and understand the consequence of proceedings against the appellant. *These are mandatory provisions and non-compliance with the same would in our view render a trial a nullity as in our instant case and under those circumstances the Court of Appeal misdirected itself in considering prejudice in this instant appeal where there had be non-compliance of the said section.* (Emphasis added.)

[12] Suffice to state at this stage that we are left in doubt as to the extent of his mental disability other than that the OKU card states it is 'mental'.

[13] How the doctor had come to the conclusion that the appellant was fully conscious of the consequences of his actions on the date of the incident is also a mystery to us.

[14] The observation made by Professor Molly Cheang writing in an article published in [1988] Anglo-American Law Review entitled *Fitness to plead in Singapore and Malaysia* is relevant and more so when great strides have been made in the field of clinical psychology and psychiatry with respect to treatment of disabilities of the mind in the last three decades. The learned author cautioned as follows with respect to 'fitness to plead' at p 209:

> The idea that persons of unsound mind should not be made to stand trial is one rooted in the age-old concept of fair play and fundamental justice. This 'fitness'

principle is both the product of the basic fundamental right of an accused to defend himself and a logical extension of the common law rule which prohibits trials in absentia. *An accused suffering from mental disability is obviously unable to take the stress of a court appearance. It is also better for the dignity of the legal process that he should not be compelled to stand trial whilst labouring under such a condition. Indeed, if the accused is unable to comprehend the proceedings and to contribute to his own defence, it would be unjust to convict him because if he were capable of following the trial he might be able to exculpate himself. Moreover, mental disability may substantially diminish an accused's capacity to testify, to recall exonerating circumstances or identify witnesses and so forth.* (Emphasis added.)

[15] Unfortunately the protocol to be followed and the matters that the trial judge should address himself as set out in *Misbah*'s case were not complied with as follows at pp 503–504:

It is, however, submitted that the courts in determining the issue of fitness *should not merely rely on the evidence of the medical officer but should also apply 'a reasonable and common sense' test*, as propounded by Smith J in *R v Presser* [1958] VR 45 and as approved by the High Court of Australia in *Kesevarajah*'s case to determine the fitness of the accused (see *Kesevarajah* at p 245):

... whether the accused person, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. In determining this issue, Smith J pointed out that the court ought to be satisfied of the following (at p 48):

He [the accused] needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge.

He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with.

He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense though he need not, of course, understand the purpose of all the various court formalities.

He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is.

He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but *he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.*

If the court is so satisfied that the person is fit for trial, the trial should then proceed. (Emphasis added.)

[16] Our CPC does not give clear guidelines on how should the courts determine an accused's fitness to stand trial unlike other jurisdictions. The

comment made in the case of *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495 at pp 505–506, still holds true:

> ... Though not relevant for the purposes of the present application, I am, however, of the view that some of these principles ought to be adopted in Malaysia. Stanley Yeo Meng Heong, Senior Lecturer at the Faculty of Law, National University of Singapore — in an article entitled *Fitness to Plead in Criminal Proceedings* [1984] 2 MLJ lxxxiv — is of the view that some of these English principles may be applicable in Malaysia by virtue of s 5 of the CPC: see note 10 of the article. The learned writer further states (at p lxxxv):
>
> > The [Criminal Procedure] Code does not define the phrase 'unsoundness of mind 'nor does it state the factors which are relevant in determining whether an accused is incapable of making his defence ... The factors to be considered in assessing the accused's mental condition at the time of the inquiry or trial are those which have evolved under English common law. These factors are whether the accused has sufficient intellect: (i) to understand the nature of the charge and the possible consequences of a finding of guilt; (ii) to instruct his legal counsel; (iii) to understand the [*505] substance of the evidence against him; and (iv) to understand the course of the proceedings at the trial so as to make a proper defence. A fifth factor of having sufficient intellect to challenge jurors is relevant in Malaysia where jury trials continue to be held [now no longer applicable].

[17] Bearing the above strictures and safeguards in mind, the learned trial judge gave scant treatment in just one paragraph his satisfaction that the OKU appellant is fit to stand trial.

[18] After stating in para 43 of his judgment the fact of sending the appellant to a government mental hospital for examination as to whether the appellant is able to stand trial under s 342(3) of the CPC the learned trial judge observed in a single paragraph in para 44 of the judgment as follows:

> 44. Selanjutnya laporan perubatan daripada Hospital Bahagia Ulu Kinta bertarikh 12 Mei 2015 telah diterima dan mengesahkan tertuduh ini berada di dalam keadaan waras dan sedar akan akibat daripada perbuatannya pada waktu kejadian dan beliau adalah stabil serta layak dihadapkan ke mahkamah untuk membela diri dan dibicarakan walaupun tertuduh memegang kad OKU (D30). Oleh itu, isu ini tidak bermerit dan tidak wajar ditimbulkan langsung.

[19] Such a non-direction had resulted in a misdirection by the learned trial judge with respect to the fitness to stand trial and to put in his defence in a case of a mentally disabled accused.

[20] Whilst the appellant may be certified as fit to stand trial, the learned trial judge must still address the fact that bearing in mind the state and extent of his mental disability, he had no difficulty following the court's procedure or to put

forth his defence and more so when the charge against him carries the mandatory death penalty upon conviction.

[21] The need for such a caution is even more grave when the ingredients of offence of trafficking would hinge on the concept of possession and with that the attendant ingredient of 'custody and control' and the presumption of 'knowledge of the nature of the substance' coupled with the element of 'carrying' or 'transporting' within the meaning of 'trafficking' under s 2 of the DDA.

[22] The learned trial judge on receiving the medical report or certificate under s 343(3) CPC in the case of a person with mental disability must caution itself by careful observation of the appellant during the process of the trial as to whether the appellant could follow the procedure and the unfolding of the evidence before him.

[23] Here we are not talking about the defence of insanity which was not raised by the assigned counsel for the appellant but rather the fitness to stand trial and to put forth his defence in a case of a mentally disabled accused. We need to remind ourselves of the caution made by the Court of Appeal in *Wong Ban Chong v Public Prosecutor* [2015] 3 MLJ 849 as follows:

> [8] In the context of s 342 of the CPC, unsoundness of mind refers to the accused's mental capacity to make his defence. It has nothing to do with the defence of unsoundness of mind under s 84 of the Penal Code. That is a matter to be decided at the conclusion of the trial, if the defence of insanity is raised. The courts only concern under the procedure prescribed by s 342 is to determine whether the accused is mentally fit to stand trial.
>
> [9] There are therefore two situations under Chapter XXXIII of the CPC where unsoundness of mind becomes an issue, one at any time during the course of the trial (s 342) and the other at the conclusion of the trial where the defence of insanity is raised and proved (s 348).
>
> [10] The policy reason behind s 343(2) of the CPC is not hard to understand. *If the accused is unfit to stand trial due to unsoundness of mind, he is not expected to be able to follow the proceeding intelligently or to give proper instructions to his counsel. The trial cannot be considered fair when the accused is unable to understand the nature of the case that is being made out against him. This is so even where he is represented by counsel.*
>
> [11] *It is true that at the trial neither the DPP nor counsel who appeared for the appellant raised the issue of the appellant's capability to make his defence but in our view it was the duty of the learned JC to ascertain this fact, having made the order of remand for psychiatric observation pursuant to* s 342(3). By proceeding with the trial without ascertaining the result of the observation, the learned JC had contravened the requirements of ss 342 and 343 of the CPC. (Emphasis added.)

A **[24]** Whilst appreciating that due deference should be given to the medical report of the medical officer, yet for justice to be seen to be done for a capital punishment offence in the case of a vulnerable person like an OKU appellant, the learned trial judge must apply his mind to the medical report with respect to the degree and extent of the mental disability as well as the nature and type
B of mental disability. Is it schizophrenia for it was recorded that the appellant had not behaved properly in prison and that such a behavior was that he was not given his injection? What drugs were being used and the effect of such drugs on his mind with respect to cognitive and comprehension capacity and capabilities in the context of maintaining calmness, composure and
C concentration. Is it autism, is it bipolar disorder or other ailments of the mind?

[25] Other jurisdictions have made tremendous strides in tailoring their criminal procedure to tackle the unfair disadvantage that a mentally disabled or
D impaired accused person have to surmount to participate meaningfully and effectively in putting forward his defence.

[26] Western Australia has their Criminal Law (Mentally Impaired Accused) Act 1996 which is 'An Act relating to criminal proceedings involving mentally
E impaired people who are charged with offences'.

[27] Part 3 of their Act is on 'Mental unfitness to stand trial'. Section 8 defines 'mental illness' as 'an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but
F does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;

[28] It defines 'mental impairment' as 'intellectual disability, mental illness,
G brain damage or senility'.

[29] Section 9 on mental unfitness to stand trial, has the following definition:

H An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —

(a) unable to understand the nature of the charge;

(b) unable to understand the requirement to plead to the charge or the effect of a plea;

I (c) unable to understand the purpose of a trial;

(d) unable to understand or exercise the right to challenge jurors;

(e) unable to follow the course of the trial;

(f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or

(g) unable to properly defend the charge.

[30] As can be seen the relevant provisions in the Western Australian Criminal Law (Mentally Impaired Accused) Act 1996 with respect to mental unfitness to stand trial are not materially different from the protocol suggested in the *Misbah*'s case and that of Professor Stanley Yeo of the National University of Singapore.

[31] As our courts have the fundamental duty to ensure a fair trial to all accused persons especially those who are certified to be mentally disabled in they being issued an OKU card, we do not have to wait for amendments to be made to incorporate the protocol but that the court can develop its own best practices in ensuring that the normal criminal procedure is harnessed to help a mentally disabled accused to effectively navigate his way through the criminal trial process.

[32] New Zealand has their Criminal Procedure (Mentally Impaired Persons) Act 2003 where 'unfit to stand trial' is defined in s 4 to mean, in relation to a defendant:

(a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and

(b) includes a defendant who, due to mental impairment, is unable —

(i) to plead:

(ii) to adequately understand the nature or purpose or possible consequences of the proceedings:

(iii) to communicate adequately with counsel for the purposes of conducting a defence.

[33] Their s 8A is even more elaborate:

8A Determining if defendant unfit to stand trial

(1) The court must receive the evidence of 2 health assessors as to whether the defendant is mentally impaired.

(2) If the court is satisfied on the evidence given under subsection (1) that the defendant is mentally impaired, the court must record a finding to that effect and —

(a) give each party an opportunity to be heard and to present evidence as to whether the defendant is unfit to stand trial; and

(b) find whether or not the defendant is unfit to stand trial; and

(c) record the finding made under paragraph (b).

(3) The standard of proof required for a finding under subsection (2) is the balance of probabilities.

(4) If the court records a finding under subsection (2) that the defendant is fit to stand trial, the court must continue the proceedings.

(5) If the court records a finding under subsection (2) that the defendant is unfit to stand trial, the court must inquire into the defendant's involvement in the offence under section 10, 11, or 12, as the case requires.

Section 8A: inserted, on 14 November 2018, by section 125 of the Courts Matters Act 2018 (2018 No 50).

[34] The United Kingdom has their Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

[35] By no means am I suggesting that we import wholesale what some jurisdictions have done for that would require either a separate Act of Parliament or the relevant amendments to our CPC. All I am saying is that the trial court here cannot shut itself to developments in the field of research into intellectual and mental disabilities and their interface with the criminal justice system and to develop relevant directions that it should address to the end that for a capital offence like drug trafficking for example, a mentally disabled accused is not disadvantaged in any way by the system and procedure derived and designed primarily for trial of normal persons with no disabilities of the mind or intellect.

PROTOCOL TO FOLLOW IN ASSESSING EVIDENCE GIVEN BY A MENTALLY DISABLED ACCUSED WITH RESPECT TO HIS UNSWORN STATEMENT FROM THE DOCK

[36] The court too, in the process of explaining the three options available to the appellant upon a finding of a prima facie case, also did not do anything to ensure that the appellant, falling into a class of persons that Parliament recognises as a person with mental disability under the Persons With Disabilities Act 2008, can meaningfully participate in the trial process and more so in defending himself.

[37] Instead the learned trial judge had informed the appellant that with respect to the option of giving an unsworn statement from the dock, that statement will be given less weight because the appellant cannot be cross-examined on what he would say in his statement.

[38] Whilst that may be so for a normal person who ordinarily may have no proper ground for refusing to be cross-examined, for a mentally disabled person, the court must proceed more cautiously and indeed try to accommodate a mentally disabled appellant into the existing criminal procedure in such a way as to allow the appellant to participate meaningfully and effectively in the trial process to defend himself.

[39] It cannot be denied that a person that possesses an OKU card is said, until the contrary is proved, to be suffering from one of the disabilities stated in the Persons With Disabilities Act 2008.

[40] In fact s 25(2) of the Persons With Disabilities Act 2008 expressed it more emphatically as follows:

> A *'Kad OKU'* issued under subsection (1) shall, unless proved to have been cancelled, be *conclusive evidence* for all purposes that the person has been *duly registered as a person with disability* under this Act. (Emphasis added.)

[41] Section 2 of the Persons With Disabilities Act 2008 further defines 'persons with disabilities' to 'include those who have *long term* physical, *mental*, intellectual or sensory *impairments* which in interaction with various barriers may hinder their full and effective participation in society'. (Emphasis added.)

[42] The Jabatan Kebajikan Masyarakat (Department of Social Welfare) recognises mental disability as 'a state of *severe mental illness makes a person unable to function either partially or fully* in matters pertaining to his or relationships in society. Among the types of mental illness are serious Organic Mental Disorder and *Chronic Schizophrenia*, Paranoid, Mood Disorder (depression, bipolar) and other Psychotic Disorder and Schizoaffective Disorder as Persistent Delusional Disorders'. (Emphasis added.)

[43] The qualifying criteria for the OKU card is that:

(a) the person must have undergone at least two years of psychiatric treatment; and

(b) psychiatrists will determine the level of social functioning, cognitive and behavioral control significantly affecting patient before he be considered for the purpose of person with disabilities ('PWD').

[44] It is precisely because the appellant is a person that suffers from long term mental impairments, the court must be careful in directing itself to the ability of the appellant to process and comprehend what he has been accused of with respect to the narration of his role in the act of trafficking in dangerous

drugs and how he can best defend himself given his mental retardation and deficiencies that a normal person does not suffer from.

[45] The fact of a person being fit to plead and stand trial does not mean that the OKU appellant with mental disability is equally well-equipped as other accused without disability or disorder to understand and conduct an effective defence. See p 9 of the unpublished dissertation *Protections for Vulnerable Accused in Malaysian Criminal Trials: Are they sufficient? Proposal for Reform* by Naziah Mohd Alias, a dissertation submitted to the Victoria University of Wellington in fulfilment of the requirements for the degree of Master of Laws, Victoria University of Wellington, 2013.

[46] Whilst there is no separate or special procedure for a criminal trial of a mentally disabled accused in our system of administration of criminal justice under the CPC, the court still has its inherent duty to ensure that such an accused person suffering from a mental vulnerability and impairment would be given a fair trial by the system designed primarily for normal functioning persons.

[47] Little wonder that s 258 of the CPC provides the following safeguard in a case where a mentally disabled accused would not be in a position to properly follow the process and progress of a criminal trial where he is accused of an offence as follows:

> Section 258 Procedure where accused does not understand proceedings.
>
> If the accused, *though not insane*, cannot be made to understand the proceedings *the Court may proceed with the trial* and, in the case of the Court of a Magistrate if the trial results in a *conviction*, *the proceedings shall be forwarded to the High Court with a report of the circumstances of the case*, and the Court of a Judge shall make therein such order or pass such sentence as it thinks fit. (Emphasis added.)

[48] It behooves a High Court in a case where the trial is before it, to assess and ascertain that an OKU accused in able to understand the proceedings and participate meaningfully with the assistance, in this case of an assigned counsel.

[49] I would go further to say that the High Court must provide an option to the OKU accused to have, as in this case an indigent accused, the resources of the state to be examined by a psychiatrist of his choice, if he is so minded to, especially when the medical report had gone further to state that the OKU appellant was aware of the consequences of his actions on the date of the commission of the offence. The need is even more imperative when it had been disclosed in the notes of evidence of the High Court that the OKU appellant had behaved abnormally in Sungai Buloh Prison because he was not given his injection. One can surmise that his mental disability is serious enough to require the injection of drugs to help him maintain his sanity.

[50] In fact for an accused person with mental disability, the option of giving an unsworn statement from the dock might be the only 'safe' way for him to give evidence to exculpate himself from his involvement in the crime. A

[51] Medical research has shown that a person who is mentally disabled would be more gullible with impaired capacity to process information and may even agree readily to suggestions out to him under cross-examination just to get out of the stress of being cross-examined. B

[52] Such an accused person with mental disability may not have the mental agility and adaptability to be able to stand his ground and assert his case in a manner that a normal person would. C

[53] He may even at times be fickle-minded and be indecisive as can be seen here in that while he had earlier elected to give evidence under oath, he had later changed his mind to giving an unsworn statement from the dock. D

[54] By not properly directing himself to the mental disability of the appellant in evaluating the evidence in the form of an unsworn statement of the appellant duly signed by him, we are left in grave doubt as to the safety of the conviction. E

[55] The learned trial Judge appeared to have taken a simplistic approach by stating that as the medical doctor had said the appellant is fit to stand trial and that he is not insane, then he is to be treated like any ordinary accused before the court. F

[56] The fact remains that his mental disability is long term as defined under the Persons With Disabilities Act and that he continues to suffer from it at the time of trial. G

[57] There are various degrees of mental disabilities or 'retardation' as was the word previously used. H

[58] The current Diagnostic and Statistical Manual of Mental Disorders (DSM-IV; American Psychiatric Association, 1994) defines mental retardation as follows: I

(a) significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test;

(b) concurrent deficits or impairments in present adaptive functioning (ie, the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas:

communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety); and

(c) onset before the age of 18.

[59] The DSM-IV definition utilises four degrees of severity that reflect the level of intellectual impairment: IQ levels between 50–55 to approximately 70 characterise mild mental retardation, 35–40 to 50–55 characterise moderate mental retardation, 20–25 to 35–40 characterise severe mental retardation, and IQ levels below 20–25 characterise profound mental retardation.

[60] In the New Zealand Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7 provides as follows:

7 Meaning of intellectual disability

(1) A person has an *intellectual disability* if the person has a permanent impairment that —

(a) results in significantly sub-average general intelligence; and

(b) results in significant deficits in adaptive functioning, as measured by tests generally used by clinicians, in at least 2 of the skills listed in subsection (4); and

(c) became apparent during the developmental period of the person.

(2) Wherever practicable, a person's general intelligence must be assessed by applying standard psychometric tests generally used by clinicians.

(3) For the purposes of subsection (1)(a), an assessment of a person's general intelligence is indicative of significantly sub-average general intelligence if it results in an intelligence quotient that is expressed —

(a) as 70 or less; and

(b) with a confidence level of not less than 95%.

(4) The skills referred to in subsection (1)(b) are —

(a) communication;

(b) self-care;

(c) home living;

(d) social skills;

(e) use of community services;

(f) self-direction;

(g) health and safety;

(h) reading, writing, and arithmetic;

(i) leisure and work.

(5) For the purposes of subsection (1)(c), the developmental period of a person generally finishes when the person turns 18 years.

[61] In this case the appellant had stated in his unsworn statement that he studied until Form 2 and that he has been having his mental disability as far back as the year 2000 and since he was born in 1982, that would be since he was 18 years old. At the time of the commission of the alleged offence he was 32 years old.

[62] If the learned trial judge had set out clearly what was said by the government psychiatrist with respect to the type of mental disabilities, then we would be in a better position to agree with the learned trial judge that having in mind the degree of the mental disability, the version of the appellant given in his defence had not been rebutted on the balance of probabilities the presumption of knowledge of the nature of the substance concealed in the newspaper wrapping found in the car which he was driving as alleged by the prosecution or in which he was in the front passenger seat as asserted by the appellant.

[63] Bereft of the degree of mental disability, we are left in serious doubt as to whether the learned trial judge had properly addressed and directed himself when he held at the end of the trial that the appellant had failed to rebut the presumption of knowledge of the substance concealed.

[64] The appellant's version of what happened on that day of arrest where the dangerous drugs were found in the car was neither fanciful nor too far fetched such that it should be dismissed as a figment of his deranged imagination.

[65] The prosecution's version of what happened as accepted by the learned trial judge was that, on the day of the arrest on 11 March 2014, around 2.45pm, ASP Mohamed Zain bin Shaik Meera ('PW3') acting on information received, led his team to surveillance and look out at the car park area in front of Block Delima, Taman Tun Teja, Rawang, Selangor ('place of incident').

[66] After about 15 minutes look out, PW3 and his team members saw a grey Proton Saga car bearing registration No WVH 6046 ('P25') had stopped suspiciously at the place of the incident.

[67] PW3 and his team members charged at the car (P25) and saw the appellant sitting alone at the driver's seat. PW3 introduced himself as police and after doing a search on the appellant and the car, PW3 found a

newspaper-wrapped package placed in between the thighs of the appellant who was seated in the driver's seat at that time.

[68] The newspaper wrapped package (P22(A)–22(D)) was inspected by PW3 in the presence of the appellant and in it was found a smaller plastic transparent package (P23) with aluminum paper wrappers (P24). Further examination revealed that the aluminum paper (P24) contained a compact lump of dried leaves suspected of being *ganja*. PW3 brought the appellant and the exhibits to the police station for further action.

[69] On the day of the incident around 5.26pm one Insp Ravindran a/l Krishnan ('PW5') who was the investigating officer (IO) of the case was duly informed by PW3 about the arrest of the appellant. PW5 met PW3 at the Bahagian Siasatan Jenayah Narkotik Daerah (BSJND) Gombak. PW5 received the appellant and the exhibits of the case that had been seized from PW3 together with the *borang serah menyerah* dated 11 March 2014 marked as P11.

[70] The exhibits seized were later sent to the chemist for analysis on 21 March 2014 around 10.37am at the Chemist Department Malaysia at Petaling Jaya and the exhibits were received by Puan Suhana bt Ismail ('PW2').

[71] PW2 duly prepared her chemist report P9 which was duly given to PW5 on 4 July 2014 around 3.45pm.

[72] The drugs exhibits were duly kept by Kpl Lauceston Dave Analisa Michale Tipok (PW1) as the storekeeper until they were produced in court.

[73] The analysis of PW2 showed that the substance seized is 'Cannabis' which is a dangerous drug specified in s 2 of the DDA weighing 242g and so stated in the chemist report marked P9.

[74] The learned trial judge was satisfied that there was no break in the chain of evidence of the seized exhibits and the cannabis that were finally analysed weighing 242g.

[75] The learned trial judge was satisfied that when the appellant was arrested by PW3 and his team, the drugs package was held by the appellant in between his thighs which evidence showed that the appellant had physical possession over the dangerous drugs and that the appellant was alone in the car at the time of arrest. The learned trial judge relied on the cases of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 and *Siew Yoke Keong v Public Prosecutor* [2013] 4 CLJ 149.

[76] The fact of mens rea possession and knowledge is derived from the inference that the appellant was arrested seated in the driver's seat with the newspaper wrapped package in between his thighs.

[77] However in the police report P29 made by the arresting officer PW3 ASP Mohd Zain at 4.21pm on the date of the incident, he stated that he had searched the car and following the search found the package wrapped in newspaper in between the appellant's thighs. The police report which was made contemporaneously after the arrest would be expected to be more reliable compared to PW3's subsequent version in court that when he arrested the appellant by placing his hand on the appellant's chest, he saw the newspaper-wrapped package in between the appellant's thigh.

[78] The material discrepancy here has raised a reasonable doubt on the prosecution's case as to where the cannabis was found. It is more likely to have been found after a search was done on the car and as stated by the appellant in his unsworn statement, the newspaper- wrapped package found underneath the driver's seat.

[79] PW3 with the rank of ASP with 30 years under his belt could not have made a mistake on the sequence of events with respect to a search being made in the car and the discovery of the package wrapped with newspaper.

[80] The fact that there was a character by the named of 'Dharan' that the appellant had wanted to visit by borrowing PW4's car was confirmed by the prosecution witness herself, one Cik Noor Wasila ('PW4'), the girlfriend of the appellant, during her cross-examination.

[81] According to PW4 she had driven the appellant in the morning of 11 March 2014 in her car to the Sungai Buloh Hospital for his medical appointment. She accompanied the appellant to see the psychiatrist there for his injection. The appellant had stated in his unsworn statement that the medical appointment was for his injection for his mental condition.

[82] Thereafter he had dropped her in his mother's house. The appellant then borrowed her car (P25) to visit his friend 'Dharan'.

[83] She said she had heard the appellant mentioned his friend 'Dharan' on a few occasions before in their conversations and even before the date of the incident (p 69 *RR Jld* 2). Such evidence becomes part of the prosecution's case. The prosecution in the circumstance of this case cannot pick and choose to use only the favourable evidence of its witness and discard or downplay the other material evidence that may raise a reasonable doubt in the prosecution's case.

A **[84]** The appellant in his unsworn statement had stated that he had known 'Dharan' for two years already at the time of the incident when he was working as a security guard in Hospital Selayang Baru where the appellant had stopped work in 2011.

B **[85]** The appellant further stated in his unsworn statement that he had driven the car to meet 'Dharan' near the lift at PPR Intan Baiduri, Block F which is where 'Dharan' stayed. The appellant confirmed that he knew where 'Dharan' resided.

C **[86]** According to the appellant, 'Dharan' borrowed the car P25 for a short while and he was asked to wait for 'Dharan' for a short while at Block F, Intan Baiduri.

D **[87]** The appellant had stated in his unsworn statement that he did not know of the package concealed at the bottom of the driver's seat and that it was 'Dharan' who had borrowed the car with the appellant seated at the front passenger seat. The appellant said he did not know where 'Dharan' took the car.

E **[88]** After about 30 minutes 'Dharan' came back and fetched him to Batu 6, Taman Tun Teja, Rawang and that it was 'Dharan' who was driving and at the driver's seat. 'Dharan' had stopped the car P25 near to the guard house at about 3pm opposite Block Kenanga where 'Dharan' had alighted with the engine still running and with the appellant sitting at the front passenger's seat.

F **[89]** According to the appellant in his unsworn statement, suddenly the police came and searched his body and found nothing and they continued to search the car P25 and later found a package wrapped in newspaper beneath the front seat of the driver.

G **[90]** The appellant said he did not know the nature of the substance in the package but the police told him it is dangerous drugs and he said he knew nothing about it.

H **[91]** The appellant had told the police when he was arrested that he was waiting for his friend 'Dharan' and that the engine was still running with the car key in the ignition. The appellant said the newspaper wrapping was not his and that it was found underneath the driver's seat where 'Dharan' had been.

I **[92]** The appellant said he was arrested at Block Kenanga and not at Block Delima and that he did not scream or tried to escape or did anything.

[93] He said he also told the police that he could show the place where 'Dharan' stayed but that the police were not interested. As stated in para 10 of the accused's unsworn statement 'Dharan' stayed at PPR Intan Baiduri, Block F and he knows his house.

[94] The investigating officer, Insp Ravindran a/l Krishnan (PW5) admitted in his evidence in court at p 90 *RR Jld* 2 as follows:

> Nama Dharan timbul dalam siasatan, tetapi saya tidak buat siasatan siapa Dharan dan dimana Dharan berada atau siasat mengenai Dharan.

[95] At p 91 *RR Jld* 2 PW5 agreed that he did not go to Block F PPR Intan Baiduri to investigate on 'Dharan'.

[96] It is a pity that the police investigation was not thorough enough and that 'Dharan' was certainly not an 'afterthought' as his name had been mentioned on a few occasions according to PW4 even before the date of the incident though PW4 had not met 'Dharan' before. No fingerprints tests were done on the package or the ignition key of the car, or steering wheel or the door handle of the car to ascertain if there could be a third person involved who is 'Dharan'. See the Federal Court case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209.

[97] In his police report lodged soon after the arrest of the appellant, PW3 had stated that it was a male Indian who drove the car when he had known by then that the appellant is an Indian Muslim.

[98] The police should have investigated further on the identity of 'Dharan' instead of ignoring the appellant's explanation altogether.

[99] The learned trial judge had at para [51] of his judgment stated that even if 'Dharan' exists, the appellant had deliberately shut his eyes to the contents in the newspapers wrapping which was not tied if indeed he had been asked to take it to the place where he was arrested.

[100] As I said if he were an ordinary normal person perhaps such a conclusion may be reasonable but for a case of a mentally disabled person, bearing in mind the below average IQ score that should have been disclosed in the medical report, that may not be a reasonable conclusion.

[101] Surely the court can take judicial notice of the fact that a person with mental disability would generally be more impressionable and gullible and even less logical in his cognitive, communication and social skills.

[102] We can take judicial notice of the fact that persons with cognitive disabilities oftentimes have problems with memory with respect to encoding, storing and retrieving information that had been observed.

[103] Their recollection of events may not always be accurate and coherent, consistent and complete and they might be more prone to confabulation, acquiescence and suggestibility.

[104] Indeed in many jurisdictions, 'accommodations' are introduced to cater to the special needs of a mentally disabled witness or accused such as a friendlier environment in the courtroom, exemption from confronting the accused, questions framed in a way that assists recollection and the provision of more qualitative information, and expert testimony that explains the meaning of a witness's words and conduct to the judge.

[105] Principle 11 of the UN Declaration on the Rights of Disabled Persons states that:

> Disabled persons shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property. If judicial proceedings are instituted against them, *the legal procedure applied shall take their physical and mental condition fully into account*. (Emphasis added.)

[106] Article 13 of the United Nations Convention of the Rights of Persons with Disabilities of which Malaysia is a signatory on 8 April 2008 with ratification on 19 July 2010 provides as follows:

> 1. States Parties shall ensure *effective access to justice for persons with disabilities* on an equal basis with others, including through the provision of *procedural* and age-appropriate *accommodations*, in order to *facilitate their effective role as direct and indirect participants*, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff. (Emphasis added.)

[107] The learned trial judge had relied on cases of ordinary normal accused persons suffering from no mental disabilities in applying the proposition that an unsworn statement from the dock is to be given less weight as compared to evidence given under oath and cited the cases of *Public Prosecutor v Tan Chee Kern & Anor* [2001] MLJU 557; [2002] 1 CLJ 210 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 as authorities for the above proposition.

[108] However when dealing with 'vulnerable' persons like an OKU appellant, the court must take judicial notice of the fact of his mental disability and the deficiencies and delay in response to mental intercourse and comprehension such that the person is so classified as 'mentally disabled'. The fact that a 'mentally disabled' person chose to give evidence by way of an unsworn statement from the dock should not be given less weight for that may be the only way in which he is competent and confident of giving evidence with respect to his recollection and recall of what happened.

[109] The status of an unsworn statement has been variously expressed in conflicting decisions of the courts and with respect to vulnerable accused persons like the appellant here, one must try to adapt the criminal procedure in such a manner as to facilitate the evidence of the mentally disabled accused instead of frustrating it or giving it featherweight, appreciating that an accused person with such a mental disability is disadvantaged by the system that works well only with normal accused persons.

[110] It would be fair to take the approach taken in the case of *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334, whereby Gopal Sri Ram JCA held at p 344 as follows:

> [16] Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v Sanassi* [1970] 2 MLJ 198, and *Low Thim Fatt v Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are dicta in many other cases, Malaysian, Australian and at least one decided by the Privy Council which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Prof Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.
>
> In our judgment, in the context of s 257(1) the critical phrase is 'elects to give evidence' and not 'elects to give evidence on oath'. The former is much wider than the latter and must *ex necessitae rei* include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s 257(1).

[111] In the Court of Appeal case of *Mohammad Reza Lajevardi Taghi v Public Prosecutor* [2015] 5 MLJ 116, the accused gave an unsworn statement from the dock as to how he had borrowed his friend's luggage bag for use to come to Kuala Lumpur. He was arrested at KLIA and he gave evidence that he did not know of the dangerous drugs found in the compartment of the luggage. The

A Court of Appeal acquitted him and set aside conviction of trafficking and death sentence passed by the High Court.

[112] On appeal to the Federal Court, the Federal Court had substituted the conviction under possession under s 12(2) and punishable under s 39A(2) of
B the DDA and sentenced the accused to 20 years imprisonment with ten strokes of whipping.

DECISION

C

[113] For an offence where the element of possession and with that the attendant ingredients of 'custody and control' and 'knowledge of the drugs' would be vital as in a charge of trafficking in dangerous drugs, the court must apply its mind to whether such a long term mental impairment as evidenced in
D the fact of issuance of an OKU card to the appellant, would affect his appreciation of what happened and how as a result his culpability for the offence might have been affected.

[114] Treating such an accused with mental disability the way a normally
E functioning person would be treated by the criminal justice system would cause a miscarriage of justice even though no defence of insanity had been raised.

[115] The ability of such an accused to stand trial and to effectively put forward his defence is a matter that the trial judge must continually assess and
F address throughout the trial to ensure that the criminal procedure that is ill-adept to cater to the disabilities of the mind for such a vulnerable accused, is nevertheless able to provide a fair trial to such an accused. Appropriate allowance and accommodation should be accorded to an accused who suffers
G from a mental disability where the evaluation of evidence and seeming contradictions are concerned.

[116] Overall the learned trial judge had not addressed his mind to the defence put forth by the appellant as best he could within a criminal justice
H system that he is ill-equipped to cope with.

[117] We were left at the end of the day with a serious doubt that the conviction was safe and that the prosecution had proved trafficking of the cannabis beyond reasonable doubt.

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[118] We unanimously set aside the conviction and death sentence of the High Court and allowed the appeal. The appellant was acquitted and discharged of the offence of trafficking in cannabis.

Appeal allowed, conviction and sentence set aside and the appellant acquitted and discharged.

Reported by Ashok Kumar